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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 109

MARTON L. WHELCHEL,

Petitioner,

vs.

A. McDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION, TEXARKANA, TEXAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HUGH CARNEY,
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A. McDONALD, WARDEN OF THE FEDERAL CORRECTIONAL INSTITUTION, TEXARKANA, TEXAS

ARGUMENT IN REPLY TO MEMORANDUM SUBMITTED BY THE SOLICITOR GENERAL IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

The Honorable Solicitor General bases his argument upon the ruling of the Court of Appeals in this case, *i. e.*, that even though the reviewing authorities had notice that the petitioner may have been insane both at the time of the commission of the offense and at the time of trial, yet, it was within the discretion of said authorities to conclude that no further or additional examination of the petitioner was necessary to justice. This was also the basis of the judgment of the trial court on habeas corpus and the basis of the opinion of the Adjutant General rendered pending the final action of the Court of Appeals in this case.

We take issue with all of them on this conclusion of law. If this construction of the law as taken by the Court of Appeals, the Solicitor General and Judge Advocate General is the law, then Article 87b of the Court-Martial Code in effect at the time of the trial of the petitioner is merely a dead letter. Also, this view of the law is contrary to the view of the first court that tried petitioner on the charges—the Court-Martial.

Although we have quoted this article and it has been quoted by the Solicitor General in his brief, we will, for the convenience of the court, again quote it, to-wit:

> "The reviewing authority will take appropriate action where it appears from the record or otherwise that the accused may have been insane at the time of the commission of the offense, or insane at the time of his trial, regardless of whether any such question was raised at the trial or of how it was determined if raised."

We think there could be no stronger way of a requirement of the law being expressed than the language of this article. It is not necessary that there be information before the reviewing authorities that the petitioner was insane, not necessary that there be evidence before the reviewing authorities of probative value requiring a finding that the petitioner was insane. The language of the statute says, "where it appears from the record or otherwise that the accused *may* (emphasis ours) have been insane, the reviewing authorities *will* (emphasis ours) take appropriate action." The Court-Martial that tried petitioner, or at least five members of a six member court, thought that the information submitted by counsel for defendant was sufficient, and recommended to the reviewing authorities that Private Whelchel be admitted to a hospital for a thorough neuropsychiatric examination. That would have been the "appropriate action" required by Article 87b.

The Court of Appeals said that the issue of his insanity was settled by the action of the Court-Martial in convicting the defendant; that it was an issue before the court and the judgment of the Court-Martial was conclusive, regardless of Article 87b, or any other law or holding of the courts to the contrary. The statement of Captain Matisin shows that there was no issue of insanity before the Court-Martial. How could an insane man make an issue of his own insanity if his lawyer himself did not know anything about it until after the trial? It would be a travesty upon justice for the courts to say that, even without Article 87b, if a man were tried who was insane at the time of the trial and his insanity was not discovered until afterwards, that there would be no relief for him. The Court of Appeals, in their opinion, says the holding that the judgment of the Court-Martial was conclusive, but the court also cited authorities to the contrary in the note to their decision. We think that the cases in the note are certainly more reasonable and more conducive to justice than those decisions which hold that the judgment of the court cannot be attacked on the grounds of insanity of the defendant at the time of the trial. Especially ought this to be the law when there was no specific issue made and the attorney for the defendant, without contradiction, knew nothing at the time of the trial of the insanity of the defendant. Within ten days from the date of the trial, the attorney discovered the insanity of the defendant and made his application to the Court-Martial for relief, attaching to his application affidavits and statements from Dr. Pellettieri, Lieutenant Graham and Sergeant Goolsby, together with his own statement of the condition of the mind of defendant during the trial. Five members of the Court-Martial signed the notation on the application made by defendant's counsel, recommending that the psychiatric examination asked by defendant's counsel be given. Had the information been discovered by defendant's counsel before

judgment of the Court-Martial, then Article 63 of the Manual for Courts-Martial would have applied, which is as follows:

> "The Court will inquire into the existing mental condition of the accused whenever at any time while the case is before the court it appears to the court for any reason that such inquiry ought to be made in the interest of justice. Reasons for such action may include anything that would cause a reasonable man to question the accused's mental capacity either to understand the nature of the proceedings or intelligently to conduct or to cooperate in his defense."

In spite of all this, the reviewing authorities also declined to give any relief to Article 87b. Their failure to do so was certainly contrary to the due process clause of the Fifth Amendment. This Article 87b gave to petitioner an invaluable right and his denial of that right was certainly a want of due process.

Habeas corpus is the proper remedy in a case of this nature. No court should refuse relief to the petition by habeas corpus, because the conclusions that petitioner has lost his rights by the judgment of the court-martial when there was no issue before the court. Even had there been an issue before the court-martial, and it had been determined by the court that petitioner was sane, yet, under the circumstances in this case, as shown by the application of defense counsel that he discovered these conditions after the judgment, Article 87b would have required the reviewing authorities to hold the psychiatric examination. We call special attention to the language of 87b, in the latter part, whereas it says this appropriate action must be taken, "regardless of whether any such question was raised at the trial, or how it was determined if raised."

The opinion of the Court of Appeals in this case and of the trial court would narrow the remedy for habeas corpus

back to the old conception of a "bare legal right;" whereas, since the opinion of this Honorable Court in *Johnson* v. *Zerbst*, most of the Federal courts have followed that decision and broadened rather than narrowed the relief to be granted by habeas corpus. We quote from the opinion in *Johnson* v. *Zerbst*, 58 Supreme Court Reporter, 1023, as follows:

> "True, habeas corpus cannot be used as a means of reviewing errors of law and irregularities—not involving the question of jurisdiction—occurring during the course of trial; and the 'writ of habeas corpus cannot be used as a writ of error.' These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in habeas corpus proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment. In such a proceeding, 'it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court' and the petitioned court has 'power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject-matter or to the person, even if such inquiry [involves] an examination of facts outside of, but not inconsistent with, the record.' Congress has expanded the rights of a petitioner for habeas corpus and the ' * * effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the act of 31 Car. II, chap. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to "dispose of the party as law and justice require."' "

In his argument, the Solicitor General gives much weight and finality to the neuropsychiatric examination of petitioner by Captain Segal, made sometime before trial. A

close examination of Captain Segal's examination, though, shows that he himself entertained some doubt as to the sanity or insanity of Private Whelchel. Captain Segal says that "here was an individual of *borderline* (emphasis ours) mental intelligence." Captain Segal also bases his conclusions upon another statement in his report in which he was in error; that is, where he says "there is no family history of mental and nervous disease." That was true so far as Captain Segal knew, but in the trial court it was shown that the petitioner's father and grandfather were both insane in the opinion of their neighbors and in the opinion of a doctor. (Transcript of Record pp. 36-38) Had Captain Segal known of this hereditary history of insanity in petitioner, undoubtedly he would have found Whelchel to have been insane, as, without that information, he said it was a borderline case.

Captain Pellettieri, who was a captain in the medical corp of the 602nd Tank Battalion, to which petitioner belonged, testified by deposition on the trial before the court that, in his opinion, Whelchel was not mentally responsible for his actions at the time of the alleged occurrence of the rape or at the time of the Court-Martial (Tr. p. 19). Captain Pellettieri testified that he formed that opinion from his own observation of Marton L. Whelchel at the time of the alleged offense and immediately before and after the same, together with a medical examination that he made of Whelchel at the time. He further testified that, in his opinion, Whelchel was suffering from total amnesia, both at the time of the alleged rape and of the trial, which was caused from battle fatigue (Tr. pp. 19-21).

The Solicitor General attempts to evade the weight of Dr. Pellettieri's testimony by the fact that the medical examination made by Dr. Pellettieri was not a psychiatric examination, and that Dr. Pellettieri was not a specialist

in psychiatry. It is true that Dr. Pellettieri was a surgeon and medical officer only, but it is also true that Dr. Pellettieri had had training in psychiatry and was psychiatrist for the Selective Service Board in Chicago before he went on active duty in the army (Tr. p. 16). In addition to Dr. Pellettieri's testimony that Whelchel was insane, Lieutenant Graham testified that, in his opinion, Whelchel was insane. Sergeant Goolsby gave a statement to the reviewing authorities that, in his opinion, Whelchel had cracked-up; and his attorney, Captain Matisin, thought he was mentally unstable. Two former neighbors of Whelchel's testified that his father and grandfather were insane. All this testimony had a legal background: facts from which the witnesses could and did testify their opinion as to the insanity of Whelchel. As we understand the law, if a witness gives facts, stating his opportunities of knowing and his observation and details and actions and conduct of the person inquired about, the witness, though a lay witness, may testify his own opinion as to the sanity or insanity of the person in question. Petitioner himself testified on habeas corpus that he knew nothing about the occurrence of the rape or about his trial. There was nothing in the record to refute all this testimony that the petitioner was insane, except the bare report of Captain Segal, which we have shown, on its face, that he also seems in doubt about it, and had he known the fact that petitioner's father and grandfather had been afflicted with forms of insanity, doubtless he would also have found that Whelchel was insane.

Petitioner's Lieutenant, Robert Graham, personally testified on the hearing before the District Court, and he said that, in his opinion, Whelchel was not mentally responsible. (Tr. p. 29) Captain Graham based this upon his intimate knowledge of Whelchel, and he recited facts and circumstances and actions of Whelchel upon which he based his

opinion. This testimony ought to be given great weight, because, of all the men, he was the one man who should know, as he had been in command of Whelchel in battle for more than three months and was closely associated with him. The Solicitor General attempts to belittle the testimony of Lieutenant Graham, because it became Lieutenant Graham's duty to file the charges and because Lieutenant Graham did not tell the Court-Martial about it while Whelchel was being tried; but it must be remembered that Lieutenant Graham was a very busy man. He was in command of the spearhead of Patton's army, which had just made the nfarch into Germany. This occurrence was just a few days before the Battle of the Bulge and Lieutenant Graham lead the way to the relief of our hard-pressed armies where the Germans had broken through. Naturally, he did not have much time and attention to give to matters of this kind, and he said he did not realize the full extent of the value of his testimony until after the sentence of death was pronounced against Whelchel. He then was brought to an abrupt consciousness of the seriousness of the situation, and he gave Captain Matisin a statement to be attached to his application for the psychiatric examination; and in that statement he told the court that Private Whelchel was mentally unstable and detailed incidents and acts of Private Whelchel leading him to that belief. So, that made three witnesses: Dr. Pellettieri, Lieutenant Graham and Sergeant Goolsby, men who ought to have known and men whose veracity ought not to be doubted, who testified that this man was insane to the extent that he did not know what he was doing, either at the time of the occurrence of the rape or at the trial. This, backed up with the testimony of two neighbors of petitioner who knew the father and grandfather of petitioner and that there was insanity in the family, was opposed only by the report of Captain Segal,

which, on its face, shows that Captain Segal himself had some doubt, and ought to lead to the inescapable conclusion by any court that here was a man who was accused of a crime who knew nothing of it and was tried by a court and convicted, of which trial he had no knowledge. This certainly was very impressive on the Court-Martial that tried petitioner, and the five members of the court evidently added to this evidence their own impression of petitioner, gained by observing him during the trial, and recommended a psychiatric examination. The Solicitor General suggests that the Court-Martial did not know of Dr. Segal's examination of petitioner and his psychiatric report. We think, from the record, the contrary is true, because the report was a part of the record and the Court-Martial, before passing sentence, would review all of the record in the case. We think it more probable that Captain Segal's report might have added to the influence on five members asking for the psychiatric examination, because the report itself throws doubt on the status of petitioner's mental stability at that time.

But in denying Whelchel the benefit of Article 87b, there was lost forever the opportunity to find out further about the truth of the matter through a thorough psychiatric examination. Doubtless, Captain Segal's examination was the mere cursory examination given to all soldiers charged with crime, hurriedly made and, therefore, inconclusive. The denial of the reviewing authorities to grant Whelchel the benefits of Article 87b, in the face of the recommendation of five members of the court that tried him, as as flagrant a violation of the due process clause as could be found.

We are by no means convinced by the ingenious argument of the Solicitor General that the whole court-martial procedure is not unconstitutional and void, but, of course, the court may not get to that question. Strange as it may

seem, for more than one hundred years this court-martial statute and procedure has not been passed upon directly by the highest court in the land. Counsel for respondent cites as authority the fact that this court has refused writs of certiorari where the question of constitutionality of this statute was involved, but this Court has held many times that the refusal of a writ is not authority for the conclusions of the lower court. We ask the court to review our argument made in our brief in the Court of Appeals and on the application for certiorari on this question. We further quote in support of our argument that the law is unconstitutional, an article in the Stanford Law Review, April 1950, page 547, as follows:

> "Designated commanding officers are authorized to convene courts-martial. It is the responsibility of these same officers (1) to determine what cases shall be tried, (2) to select the type of court, (3) to appoint all members of the court, (4) to appoint the trial judge advocate or prosecuting officer, and (5) in most cases, to appoint counsel for defense. If there is a conviction the same commanding officer reviews the record of the trial, and has the power to reduce the sentence. The sentence can only be executed if ordered by the commanding officer or higher authority. This concentration of power in one man has no counterpart in the administration of justice in the civil courts. A fair and impartial trial is obviously difficult in such an atmosphere of command control. An officer who the commander believes is too lenient can be removed from service on the court; a defense counsel who is too successful may not remain a defense counsel very long. All the personnel connected with the trial are dependent on the commanding officer for assignments, leaves, and promotions. Even a slight deviation from the commander's wishes is likely to bring a severe reprimand. Under these circumstances, many officers will be susceptible to his influence. An illustration of the pervasiveness of command control is the custom of army courts-

> martial automatically to impose maximum penalties because the commander wants exclusive control over length of sentences.''

For the reasons stated in this argument and in our previous briefs, it is respectfully submitted that the court should reverse the judgments of the trial court and of the Court of Appeals and render judgment ordering the petitioner released from custody.

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